BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PEDRO RIVAS	)	
Claimant	)	
VS.	)	
	)	Docket No. 256,898
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the December 30, 2004, Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 29, 2005.

APPEARANCES

Diane F. Barger of Wichita, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent, which is self-insured.

RECORD AND STIPULATIONS

The parties agree all of the transcripts and evidence introduced in either this claim or in Docket No. 265,344, which was litigated simultaneously, should be considered in deciding both claims. The parties also agree that Dan R. Zumalt's task list, which sets forth Dr. Peter V. Bieri's task loss opinion and which was attached to respondent's brief to the Board as Ex. 1, is part of the record for this claim. In addition, the parties' stipulations are listed in the Award.

The Judge's recitation of the record includes a September 13, 2004, deposition of Dr. Vito Carabetta. The reference, however, to such a transcript appears to be an error.

ISSUES

This is a claim for a February 24, 2000, accident and resulting low back injury. In the December 30, 2004 Award, Judge Avery determined claimant sustained a five percent whole person functional impairment due to his low back injury, along with a 100 percent task loss, a 100 percent wage loss, and a 100 percent permanent partial general disability as defined by K.S.A. 1999 Supp. 44-510e.

Respondent contends Judge Avery erred. Respondent argues claimant failed to make a good faith effort to find appropriate work and, therefore, a post-injury wage should be imputed for the period following September 16, 2002, when claimant last worked for respondent. Accordingly, respondent argues the Board should impute a post-injury wage of $260 per week, which would reduce claimant's wage loss to 57 percent. Next, respondent argues claimant failed to prove a task loss due to his low back injury only. In short, respondent contends claimant has sustained a 28.5 percent work disability (a permanent partial general disability greater than the functional impairment rating).

> Respondent concedes at this time, however, that claimant is entitled to compensation for a permanent partial general disability, (work disability), effective September 17, 2002, that being his first date of unemployment, in an accordance with the rationale of Niesz v. Bill's Dollar Store, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999). "Placing an injured worker in an accommodated job artificially avoids work disability by allowing the employee to retain the ability to perform work for a comparable wage. Once an accommodated job ends, the presumption of no work disability may be rebutted." Id. at Syl. 2.
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> This rule of law does not, however, permit claimant to combine the effects of several injuries for consideration of the extent of work disability in this claim. Claimant's Award of Compensation herein should be premised solely upon the effects of low back injury sustained on February 24, 2000.[1]

Conversely, claimant contends the December 30, 2004, Award should be affirmed.

The sole issue before the Board on this appeal is the nature and extent of claimant's injury and disability that arose from his February 24, 2000, accident and resulting low back injury.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. In August 1993, claimant began working for respondent, which operates a meat processing plant. In January 2000, while working as a meat trimmer, claimant began having low back pain. The parties agreed the appropriate date of accident for claimant's low back injury, which was apparently caused by a series of mini-traumas from repetitively bending, was February 24, 2000.

[1] Resp. Brief at 3 (filed Feb. 23, 2005).

2. Claimant filed a second claim for workers compensation benefits alleging he injured his neck, upper back, and both shoulders each workday through February 16, 2001, working for respondent. Respondent agreed to that date of accident for that repetitive injury claim. That claim was assigned Docket No. 265,344 and was decided the same date as this docketed claim. The facts pertinent to the two docketed claims are intertwined and, therefore, the findings below also refer to the alleged injuries that are the subject of Docket No. 265,344.

3. When claimant reported his low back symptoms to respondent, the company referred him for medical treatment. In February 2000, claimant first saw Dr. Hutchison, who prescribed medications and physical therapy and also obtained x-rays and a CT scan of claimant's low back. The CT scan revealed a disc bulge at L4-5 and a posterior central disc protrusion at L5-S1. The doctor placed medical restrictions upon claimant. Consequently, respondent moved claimant to a different trimmer job and later moved claimant to other light duty jobs, which over a period of time aggravated his upper extremities.

4. On April 20, 2000, claimant began seeing board-certified orthopedic surgeon Dr. Jeffrey T. MacMillan for his low back complaints. The doctor diagnosed degenerative disc disease at L4-5 and L5-S1 and recommended epidural steroid injections followed by an MRI, if needed. When Dr. MacMillan saw claimant on May 18, 2000, claimant advised he did not want any additional treatment for his low back. Accordingly, the doctor then rated claimant under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.) as having a five percent whole person functional impairment due to the low back injury. The doctor also ordered the first of several functional capacity evaluations.

5. In June 2000, Dr. MacMillan began treating claimant for a left knee problem, which has not been claimed as being work-related.

6. At the request of his then-attorney, Mr. Derek R. Chappell, on August 8, 2000, claimant was evaluated by board-certified orthopedic surgeon Dr. Sergio Delgado for the low back complaints. The doctor recommended epidural injections and possible low back surgery, if the injections did not help.

7. Approximately one week later, on August 16, 2000, claimant returned to Dr. MacMillan. Claimant complained of a considerable increase in waistline discomfort radiating down the left leg. The doctor ordered an MRI of the lumbar spine, which was done on August 30, 2000, and which showed degenerative disc changes at L4-5 and L5-S1. And when the doctor saw claimant on October 13, 2000, claimant reported left knee pain, increasing low back and upper back pain, and pain between his shoulder blades. But when the doctor saw claimant again on November 10,

2000, the doctor thought claimant was ready to return to unrestricted work. Accordingly, Dr. MacMillan ordered a second functional capacity evaluation, which indicated claimant's primary complaint was pain in his upper back and both shoulder girdles. According to the doctor, the November 2000 functional capacity evaluation indicated claimant made a consistent effort but it also indicated inconsistencies between claimant's pain rating and his observed behavior. On the other hand, the therapist who administered the test concluded the test was valid.

8. In short, by the fall of 2000 claimant was complaining of symptoms in his left knee, low back, both legs, neck and upper back, and both shoulders. Respondent's medical dispensary records dated September 26, 2000, note claimant reported bilateral shoulder pain.

9. Claimant saw Dr. MacMillan again in December 2000 with complaints of right-sided neck pain radiating onto the top of his right shoulder and low back complaints. The doctor recommended lumbar epidural steroid injections followed by a myelogram and EMG and nerve conduction studies. The doctor saw claimant again in late January 2001 and February 2001. At the latter visit, claimant complained of severe pain in his left knee; severe low back pain with pain, numbness, and paresthesia radiating down both legs; and right neck and shoulder pain. Dr. MacMillan restricted claimant from repetitively using his right hand above the shoulder level.

10. Respondent's medical dispensary notes indicate that on approximately February 16, 2001, the company placed claimant off work. And that is the date the parties chose as being the appropriate date of accident for Docket No. 265,344, which addresses claimant's bilateral shoulder injuries.

11. Dr. MacMillan saw claimant again in March 2001 and recommended an EMG, nerve conduction studies and an MRI of the right shoulder. The EMG and nerve conduction studies were conducted on March 21, 2001, and were normal. At claimant's March 9 and April 25, 2001, office visits with Dr. MacMillan, the doctor noted claimant freely moved his hand far in excess of what claimant represented he was capable of.

12. In May 2001, claimant saw Dr. MacMillan and advised he did not want shoulder surgery. Accordingly, the doctor rated claimant's right shoulder injury and referred claimant for a third functional capacity evaluation. That evaluation was conducted on May 31 and June 5, 2001. According to the corresponding functional capacity report, claimant had not worked since February 16, 2001. Moreover, the therapist concluded claimant gave poor and inconsistent effort throughout the testing. Accordingly, due to claimant's self-limiting behavior, the therapist was unable to determine claimant's maximal functional capabilities.

13. On June 4, 2001, again at Mr. Chappell's request, Dr. Delgado saw claimant for a second time. This time, the doctor evaluated claimant for the problems he was having with his upper back, neck, and shoulders. Dr. Delgado concluded claimant had bilateral shoulder impingement and a possible rotator cuff tear. The doctor also diagnosed myofascial symptoms in claimant's neck and shoulders. Dr. Delgado recommended conservative treatment such as cortisone injections, therapy, exercise, electrical stimulation, anti-inflammatories, analgesics, and work restrictions. The doctor also noted that claimant might need arthroscopic examination and decompression of both shoulders.

14. Thinking that claimant had reached maximum medical improvement, respondent contacted Dr. MacMillan regarding claimant's permanent work restrictions. Dr. MacMillan had earlier written respondent advising that he was unable to determine claimant's restrictions due to symptom magnification and inconsistent testing. Consequently, in June 2001 respondent asked the doctor what restrictions he would typically place upon someone with claimant's diagnoses. The doctor responded by stating there should be no repetitive or extended periods of bending, stooping, heavy lifting or carrying; no repetitive kneeling or squatting; and no repetitive or extended use of the right hand above shoulder level. The doctor further advised in July 2001 that claimant could lift or carry up to 50 pounds.

15. In late October 2001, claimant attempted to perform a regular duty job, trimming short ribs. But within a few days, claimant advised respondent's dispensary that he was unable to perform the work due to pain in his neck, right shoulder, and low back. Shortly afterwards, on November 19, 2001, claimant returned to Dr. MacMillan for additional right shoulder treatment. At that visit, the doctor diagnosed right shoulder impingement syndrome and recommended right shoulder surgery. The doctor immediately wrote respondent and advised that claimant opted for surgery. When the doctor next saw claimant on December 28, 2001, claimant complained of neck pain, right shoulder pain, and pain radiating across the top of both shoulders. The doctor noted claimant remained intent on having the right shoulder surgery, which had been scheduled for January 23, 2002.

16. In the meantime, on December 4, 2001, at Mr. Chappell's request, Dr. Delgado saw claimant for a third time. The purpose of this evaluation was to rate claimant's impairment under the AMA *Guides* (4th ed.). Dr. Delgado concluded claimant had a six percent functional impairment to each upper extremity, which converted to an eight percent whole person impairment, due to his bilateral shoulder injuries. The doctor also concluded claimant had a five percent whole person functional impairment due to his low back injury.

17. On January 23, 2002, Dr. MacMillan operated on claimant's right shoulder and performed a subacromial decompression and repaired the torn rotator cuff.

18. After recovering from the right shoulder surgery, claimant returned to work for respondent with restrictions and wiped grease off conveyor belts. At claimant's May 10, 2002, visit with Dr. MacMillan, the doctor felt claimant demonstrated signs of malingering. In his May 10, 2002, letter to respondent, the doctor wrote, in part:

> Mr. Rivas demonstrates clear signs of malingering. He demonstrates far more shoulder motion in taking off and putting on his jacket than he demonstrates in formal shoulder range of motion testing. Although he has been in a light duty job, which he says only involves use of his left hand, he reports a two week history of increasing right upper extremity symptoms which he relates to having to wring out the cloth which he uses to wipe the belts at work. At this point, I would suggest electrical studies of his right upper extremity to ensure that he does not have a treatable condition. I would also suggest repeating the functional capacity evaluation to determine some final work restrictions prior to completing his final rating and release.[2]

Consequently, claimant underwent a fourth functional capacity evaluation on May 28 and 30, 2002.

19. Dr. MacMillan saw claimant on June 14, 2002, for a final evaluation. Claimant reported persistent pain in his right shoulder with pain radiating from his neck to his right hand. In addition to the right shoulder problem, the doctor diagnosed right carpal tunnel syndrome, which was confirmed by EMG and nerve conduction studies. The doctor concluded claimant did not want to pursue any additional treatment for his carpal tunnel syndrome and, therefore, the doctor concluded claimant had reached maximum medical improvement. The doctor rated claimant as having a 10 percent impairment to the right upper extremity due to the carpal tunnel syndrome and an additional six percent impairment to the right upper extremity due to his shoulder injury. The doctor also concluded claimant should avoid repetitive use of his right hand and avoid lifting or carrying greater than 10 pounds, with frequent lifting or carrying limited to no more than five pounds.

20. In late June 2002, claimant reported to respondent's dispensary that he was unable to wipe grease off the belts due to pain in both hands from squeezing a spray bottle.

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[2] Stipulation of Dr. MacMillan's Records into Evidence, with attachments (filed Nov. 17, 2004).

The claimant also noted soreness in his back and objected to the job wiping belts due to the bending and twisting it required. Accordingly, claimant again left work.

21. In August 2002, after Dr. MacMillan had released claimant from treatment, respondent's medical case manager, Lisa Bessmer, attempted to find claimant a permanent regular duty job. According to Ms. Bessmer, the restriction from Dr. MacMillan that provided the greatest obstacle in placing claimant in a permanent position was the restriction against repetitive or extended use of the right hand. And that restriction, which was placed on claimant due to the right carpal tunnel syndrome, effectively limited claimant to one-handed work according to Ms. Bessmer.

22. Respondent accommodated claimant's injuries through September 16, 2002, when he was sent home and placed on a leave of absence. Respondent officially terminated claimant on September 18, 2003, because he had been unable to obtain a regular duty job within his work restrictions during the one-year period of his leave of absence.

23. On October 29, 2002, board-certified orthopedic surgeon Dr. Edward J. Prostic evaluated claimant for Mr. Chappell. The doctor diagnosed low back sprain and strain, for which he suggested epidural steroid injections. The doctor also diagnosed an operated partial thickness rotator cuff tear in the right shoulder, for which the doctor recommended anti-inflammatories and therapeutic exercises. In addition, Dr. Prostic believed claimant needed carpal tunnel release surgery on the right wrist. In short, the doctor did not feel claimant had reached maximum medical improvement.

24. At Mr. Chappell's request, on March 11, 2003, Dr. Prostic examined and evaluated claimant for a second time. During that examination, the doctor found slight improvement in the range of motion in claimant's low back and rated claimant under the AMA *Guides* (4th ed.) as having a 10 percent whole person functional impairment. Moreover, Dr. Prostic concluded claimant did not need any work restrictions for his low back.

25. Dr. Prostic also evaluated claimant's right upper extremity at their March 11, 2003, meeting. Dr. Prostic, unlike Dr. Delgado, found neither crepitus nor impingement in the shoulder. Dr. Prostic determined claimant had a 16 percent functional impairment to the right upper extremity due to his shoulder injury. Moreover, Dr. Prostic recommended that claimant perform only minimal activities with his right hand at or above shoulder height, avoid repetitive heavy lifting with his right arm, lift no more than 45 pounds to waist height or 20 pounds to shoulder height occasionally, or one-half those amounts repetitively. Dr. Prostic did not rate

claimant's left upper extremity and did not recall claimant ever making any left shoulder complaints.

26. While this claim was pending, claimant obtained a new attorney, who asked Dr. Delgado to examine and evaluate claimant for a fourth time. Dr. Delgado saw claimant on March 11, 2004, and diagnosed chronic low back pain, crepitus and impingement syndrome in both shoulders, and right carpal tunnel syndrome. The doctor, however, admitted he conducted several tests that were negative for impingement and that crepitus was the most significant positive finding that he could recall.

27. As a result of the March 2004 examination, Dr. Delgado modified the earlier rating he had provided in December 2001 by adding an amount for the right carpal tunnel syndrome. The doctor, however, did not disturb his earlier ratings of five percent to the whole person for the low back injury or the six percent functional impairment to each upper extremity (or eight percent to the whole person) for the bilateral shoulder injuries. Moreover, Dr. Delgado recommended claimant avoid repetitive bending, stooping, and twisting due to his low back. The doctor also recommended claimant avoid repetitive use of his upper extremities due to the carpal tunnel syndrome and avoid lifting more than 10 pounds overhead due to both his low back and shoulders.

28. On August 20, 2004, Dr. Peter V. Bieri evaluated claimant at Judge Avery's request. During that evaluation, claimant complained of severe and persistent low back pain, persistent neck pain that radiated into both shoulders (greater on the right than the left), and pain, numbness, and tingling in the right hand and wrist. Using the AMA *Guides* (4th ed.), Dr. Bieri determined claimant had a six percent functional impairment to each upper extremity due to crepitance and shoulder impingement syndrome and a five percent whole person functional impairment due to the low back injury. The doctor also rated claimant's right carpal tunnel syndrome but that rating is not pertinent to this claim. Moreover, the doctor noted claimant was a rather poor historian.

29. Dr. Bieri also provided his opinion regarding claimant's permanent work restrictions. But the doctor did not specifically separate the restrictions for the low back from those for the shoulders or the carpal tunnel syndrome. In his August 20, 2004, letter to Judge Avery, the doctor wrote, in part:

> Physical restrictions are issued in accordance with the "Dictionary of Occupational Titles", Fourth Edition Supplement, as published by the U.S. Department of Labor. Based on review of documentation as provided and the results of clinical examination, **considering the**

> **multiple anatomic sites of injury and degree of permanent impairment**, I would conclude the claimant meets the general physical demand level defined as *light-medium*. This would limit occasional lifting to 35 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds of constant lifting. Repetitive gripping and grasping of the right upper extremity should be performed no more than frequently. Shoulder-level and overhead use of the upper extremities should be performed no more than occasionally. Repetitive bending and stooping should be performed no more than frequently. (Emphasis added.)

30. After being terminated by respondent, claimant sought other work in the Emporia, Kansas, area. Claimant, however, who completed the fifth or sixth grade in Mexico and whose labor history is limited to manual labor, has not found other employment. Claimant testified that after respondent sent him home in September 2002 he returned to the meat processing plant on a weekly basis to bid on jobs. Claimant described his job search as checking with two or three potential employers each week, advising them he has medical restrictions and problems with his back and both shoulders.

31. At the February 20, 2004, regular hearing, claimant introduced copies of approximately 10 job applications (Braum's, Pizza Hut, Reeble Inc., Big Lots, Dollar General, Wal-Mart, Dillon Stores, and approximately three unidentified companies) he had completed and submitted. Claimant also noted that some companies he contacted either did not have job applications or did not permit him to complete an application. As claimant neither reads nor writes English, his 17-year-old daughter completed the job applications.

32. At his March 10, 2004 deposition, claimant introduced two more job applications (Emporia Amoco and an unidentified company) that he had submitted following the February 2004 regular hearing. At his deposition, claimant testified he had been to the Emporia, Kansas, unemployment office eight to 10 times and had checked the newspaper for jobs approximately four times since September 2002. Moreover, claimant testified he did not feel he could perform any job that would require him to bend even only a few times a day.

33. On July 29, 2004, claimant testified again. Claimant introduced copies of an additional 15 job applications (Phillips 66, Emporia Amoco, Texaco/Conoco Food Mart, Dillon Stores, Reeble Inc., Big Lots, Dollar General, Gambino's Pizza, Taco Bell, Golden Corral, and approximately five unidentified companies) that he had completed and submitted following his previous deposition.

34. Claimant's attorney hired vocational expert Dick Santner to interview claimant and compile a list of the work tasks claimant performed in the 15-year period before developing his low back and shoulder injuries. Mr. Santner met with claimant in October 2003 and identified five former work tasks. Mr. Santner testified that based upon Dr. Delgado's March 2004 evaluation, claimant would be unemployable. In addition, Mr. Santner testified claimant might be unemployable considering all of the restrictions from Dr. MacMillan in light of claimant's work history and education. On the other hand, considering either Dr. Bieri's work restrictions or Dr. Prostic's restrictions, claimant could work and earn between $6 and $7 per hour, or between $240 and $280 per week. During their interview, claimant told Mr. Santner that since leaving respondent's employment he had primarily applied for custodial jobs in the Emporia area but claimant could only recall Wal-Mart as being one of the stores where he had applied. Mr. Santner was not asked to consider claimant's retained ability to earn wages based solely upon the low back injury or based solely upon the alleged bilateral shoulder injuries.

35. Respondent hired vocational expert Dan R. Zumalt to analyze claimant's former jobs and comprise a list of the tasks claimant performed in the 15-year period before his work-related injuries. Mr. Zumalt met with claimant in October 2003 and identified 13 former tasks from the job descriptions provided by claimant. On the other hand, Mr. Zumalt identified 14 former work tasks when considering additional information garnered from respondent. Combining the restrictions from Dr. Prostic and Dr. MacMillan, along with claimant's limited English skills, Mr. Zumalt concluded claimant retained the ability to earn approximately $260 per week as a kitchen helper or dishwasher. Mr. Zumalt, likewise, was not asked what claimant could earn considering his low back injury only or claimant's alleged bilateral shoulder injuries only.

CONCLUSIONS OF LAW

Considering the entire record, the Board concludes claimant initially injured his low back while working for respondent. Later, claimant injured both shoulders while performing the work that respondent provided to accommodate for the low back injury. Even later, claimant developed right carpal tunnel syndrome.

Claimant filed separate claims for the low back and bilateral shoulder injuries and the parties attempted to litigate the claims separately. The subject of this claim, however, is the low back injury. The bilateral shoulder injury claim is the subject of Docket No. 265,344. The parties also represent that claimant filed another claim for the right carpal tunnel syndrome and that claim has been settled.

These claims have not been consolidated and, therefore, the low back injury will be addressed in this order and the alleged bilateral shoulder injuries will be addressed in the order issued this same date in Docket No. 265,344. The findings of fact in this claim, however, are practically identical to those in the other docketed claim.

The parties stipulated claimant injured his low back in an accident that arose out of and in the course of his employment with respondent. Moreover, respondent agrees that claimant is entitled to receive permanent disability benefits under K.S.A. 1999 Supp. 44-510e for a work disability.

As a low back injury is not addressed in the schedules of K.S.A. 1999 Supp. 44-510d, claimant's right to permanent disability benefits is governed by K.S.A. 1999 Supp. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as set forth in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute)

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that the post-injury wage should be based upon the ability to earn wages rather than actual post-injury wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

The Kansas Court of Appeals in *Watson*[6] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony, concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

1. What is the functional impairment rating due to the low back injury?

The medical evidence establishes that claimant has sustained a sprain or strain to his low back. Dr. MacMillan, claimant's treating physician, rated the low back injury as comprising a five percent whole person functional impairment. Likewise, claimant's medical expert Dr. Delgado and the Judge's independent medical expert, Dr. Bieri, both rated claimant's low back injury at five percent of the whole person. Only claimant's medical expert Dr. Prostic deviated from the five percent rating as he concluded claimant's low back injury comprised a 10 percent impairment to the whole person.

The Board concludes the greater weight of the medical evidence establishes that claimant sustained a five percent whole person functional impairment due to his work-related low back injury.

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[5] *Id.* at 320.

[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[7] *Id.* at Syl. ¶ 4.

2. What is claimant's task loss due to the low back injury?

The evidence regarding claimant's task loss is somewhat muddled as the parties were not always diligent in asking the witnesses to consider only the low back injury in assessing claimant's loss. Considering only claimant's low back condition, Dr. MacMillan concluded claimant could perform jobs falling in the light-medium to medium physical demand level and, therefore, claimant did not sustain any task loss due to his low back injury. Dr. Prostic determined claimant did not need any work restrictions due to the low back injury and, likewise, concluded claimant had no task loss due to his low back injury.

On the other hand, Dr. Delgado reviewed the task list prepared by Mr. Santner and concluded claimant lost the ability to perform all five former work tasks due to his low back injury and resulting restrictions. And Dr. Bieri determined claimant lost the ability to perform three of the five tasks, or 60 percent, from Mr. Santner's task list and lost the ability to perform three of the 13 non-duplicated tasks, or 23 percent, from Mr. Zumalt's list. Unfortunately, Dr. Bieri did not indicate whether the loss of those tasks was due to claimant's low back injury or his other injuries. All of the tasks that Dr. Bieri indicated claimant could not perform, however, required either forceful grasping bilaterally, constant reaching over the shoulders bilaterally, constant reaching and handling, and/or constant grasping with the right hand. Accordingly, it is questionable that Dr. Bieri eliminated any of claimant's former tasks due to the low back injury.

The Board concludes claimant has failed to establish that he is unable to perform any of his former work tasks due to his low back injury. Consequently, claimant has not proven a task loss for purposes of the permanent partial general disability formula in this claim.

3. What is the difference in the wages claimant was earning at the time of the injury as compared to the wages he is earning or is capable of earning after the injury?

When claimant last testified, he remained unemployed and had not worked since September 16, 2002, when respondent sent him home. Claimant's lack of employment, however, does not automatically qualify him for a 100 percent wage loss in computing his permanent disability benefits. As indicated above, the Kansas appellate courts have held a worker must make a good faith effort to find appropriate employment or a post-injury wage will be imputed for purposes of determining the worker's permanent partial general disability under K.S.A. 1999 Supp. 44-510e.

Claimant last testified in late July 2004. As of that time, claimant had submitted approximately 27 applications for jobs with prospective employers during the 22 months following his last day of working for respondent. Claimant testified he was contacting two

or three potential employers each week but the record does not contain any information regarding those contacts such as the name of the company, the date of the contact, how they were contacted, how many contacts were duplicates, how he had learned of the company, whether any positions were open, what position he was applying for, or any other information to assist in determining whether claimant was making a good faith effort to find work. The record also discloses that claimant had contacted the Emporia unemployment office only eight to 10 times and that he had checked the newspaper want ads only a handful of times.

Claimant introduced copies of various job applications he had allegedly submitted to prospective employers. Those applications indicate claimant sometimes restricted the hours or the days that he was available for work. And those hours and days varied among the applications. Some of the restrictions claimant noted on the applications are inconsistent. Moreover, one application indicated claimant was looking for work because his attorney had told him to and many applications indicated claimant readily volunteered that he had been injured and respondent could not retain him due to his medical restrictions.

Considering the entire record, the Board concludes claimant failed to prove he made a good faith effort to find work after September 2002, when he last worked for respondent. Accordingly, the Board must impute a post-injury wage.

Mr. Santner determined claimant retains the ability to earn between $240 and $280 per week and Mr. Zumalt determined claimant can earn $260 per week. As indicated above, the vocational experts were not asked what claimant could earn considering the low back injury only.

The Board concludes claimant's back injury has restricted the jobs that he can now perform and, therefore, the low back injury has reduced his ability to earn wages and has contributed to his present lack of employment. Based on this record, the Board finds claimant retains the ability to earn at least $260 per week despite his low back injury. Consequently, that sum should be used for the wage loss prong of the permanent partial general disability formula.

The parties stipulated $454.78 was claimant's average weekly wage on the date of accident. Comparing $454.78 to the post-injury wage of $260 yields a wage loss of 42.8 percent.

4. What is claimant's permanent partial general disability under K.S.A. 1999 Supp. 44-510e?

Computing claimant's permanent disability rating under K.S.A. 1999 Supp. 44-510e is a simple mathematical equation once the task loss and wage loss percentages are determined. Averaging the zero percent task loss with the 42.8 percent wage loss yields a 21.4 percent permanent partial general disability, which would commence September 17, 2002, when claimant last worked for respondent. Before that date, claimant's permanent partial general disability under K.S.A. 1999 Supp. 44-510e is limited to the five percent whole person functional impairment rating as there is no proof that claimant was earning less than 90 percent of his pre-injury wage while respondent accommodated claimant's back injury by providing him with light duty work.

Accordingly, the December 30, 2004 Award should be modified. Claimant is entitled to receive benefits for a five percent permanent partial general disability through September 16, 2002, followed by a 21.4 percent permanent partial general disability.

AWARD

WHEREFORE, the Board modifies the December 30, 2004, Award and grants claimant benefits for a five percent permanent partial general disability through September 16, 2002, followed by a 21.4 percent permanent partial general disability.

Pedro Rivas is granted compensation from IBP, Inc., for a February 24, 2000, accident and resulting disability. Based upon an average weekly wage of $454.78, Mr. Rivas is entitled to receive the following disability benefits:

For the period ending September 16, 2002, Mr. Rivas is entitled to receive 20.75 weeks of permanent partial general disability benefits at $303.20 per week, or $6,291.40, for a five percent permanent partial general disability.

For the period commencing September 17, 2002, Mr. Rivas is entitled to receive 68.06 weeks of permanent partial general disability benefits at $303.20 per week, or $20,635.79, for a 21.4 percent permanent partial general disability.

The total award is $26,927.19, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director